

tation of the Federal electronic commerce system within each respective department or agency.

3. NO PRIVATE RIGHTS CREATED.

This directive is for the internal management of the executive branch and does not create any right or benefit, substantive or procedural, enforceable by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

The Director of the Office of Management and Budget is authorized and directed to publish this memorandum in the Federal Register.

WILLIAM J. CLINTON.

§ 403. Definitions

As used in this chapter:

(1) The term “executive agency” means—

(A) an executive department specified in section 101 of title 5;

(B) a military department specified in section 102 of such title;

(C) an independent establishment as defined in section 104(1) of such title; and

(D) a wholly owned Government corporation fully subject to the provisions of chapter 91 of title 31.

(2) The term “procurement” includes all stages of the process of acquiring property or services, beginning with the process for determining a need for property or services and ending with contract completion and closeout.

(3) The term “procurement system” means the integration of the procurement process, the professional development of procurement personnel, and the management structure for carrying out the procurement function.

(4) The term “standards” means the criteria for determining the effectiveness of the procurement system by measuring the performance of the various elements of such system.

(5) The term “competitive procedures” means procedures under which an agency enters into a contract pursuant to full and open competition.

(6) The term “full and open competition”, when used with respect to a procurement, means that all responsible sources are permitted to submit sealed bids or competitive proposals on the procurement.

(7) The term “responsible source” means a prospective contractor who—

(A) has adequate financial resources to perform the contract or the ability to obtain such resources;

(B) is able to comply with the required or proposed delivery or performance schedule, taking into consideration all existing commercial and Government business commitments;

(C) has a satisfactory performance record;

(D) has a satisfactory record of integrity and business ethics;

(E) has the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain such organization, experience, controls, and skills;

(F) has the necessary production, construction, and technical equipment and facilities, or the ability to obtain such equipment and facilities; and

(G) is otherwise qualified and eligible to receive an award under applicable laws and regulations.

(8) The term “technical data” means recorded information (regardless of the form or method of the recording) of a scientific or technical nature (including computer software documentation) relating to supplies procured by an agency. Such term does not include computer software or financial, administrative, cost or pricing, or management data or other information incidental to contract administration.

(9)(A) The term “major system” means a combination of elements that will function together to produce the capabilities required to fulfill a mission need, which elements may include hardware, equipment, software or any combination thereof, but excludes construction or other improvements to real property; and

(B) a system shall be considered a major system if (i) the Department of Defense is responsible for the system and the total expenditures for research, development, test and evaluation for the system are estimated to be more than \$75,000,000 (based on fiscal year 1980 constant dollars) or the eventual total expenditure for procurement of more than \$300,000,000 (based on fiscal year 1980 constant dollars); (ii) a civilian agency is responsible for the system and total expenditures for the system are estimated to exceed \$750,000 (based on fiscal year 1980 constant dollars) or the dollar threshold for a “major system” established by the agency pursuant to Office of Management and Budget (OMB) Circular A-109, entitled “Major Systems Acquisitions”, whichever is greater; or (iii) the system is designated a “major system” by the head of the agency responsible for the system.

(10) The term “item”, “item of supply”, or “supplies” means any individual part, component, subassembly, assembly, or subsystem integral to a major system, and other property which may be replaced during the service life of the system, and includes spare parts and replenishment spare parts, but does not include packaging or labeling associated with shipment or identification of an “item”.

(11) The term “simplified acquisition threshold” means \$100,000.

(12) The term “commercial item” means any of the following:

(A) Any item, other than real property, that is of a type customarily used by the general public or by nongovernmental entities for purposes other than governmental purposes, and that—

(i) has been sold, leased, or licensed to the general public; or

(ii) has been offered for sale, lease, or license to the general public.

(B) Any item that evolved from an item described in subparagraph (A) through advances in technology or performance and that is not yet available in the commercial marketplace, but will be available in the commercial marketplace in time to satisfy the delivery requirements under a Federal Government solicitation.

(C) Any item that, but for—

(i) modifications of a type customarily available in the commercial marketplace, or

(ii) minor modifications made to meet Federal Government requirements, would satisfy the criteria in subparagraph (A) or (B).

(D) Any combination of items meeting the requirements of subparagraph (A), (B), (C), or (E) that are of a type customarily combined and sold in combination to the general public.

(E) Installation services, maintenance services, repair services, training services, and other services if—

(i) the services are procured for support of an item referred to in subparagraph (A), (B), (C), or (D), regardless of whether such services are provided by the same source or at the same time as the item; and

(ii) the source of the services provides similar services contemporaneously to the general public under terms and conditions similar to those offered to the Federal Government.

(F) Services offered and sold competitively, in substantial quantities, in the commercial marketplace based on established catalog or market prices for specific tasks performed and under standard commercial terms and conditions.

(G) Any item, combination of items, or service referred to in subparagraphs (A) through (F) notwithstanding the fact that the item, combination of items, or service is transferred between or among separate divisions, subsidiaries, or affiliates of a contractor.

(H) A nondevelopmental item, if the procuring agency determines, in accordance with conditions set forth in the Federal Acquisition Regulation, that the item was developed exclusively at private expense and has been sold in substantial quantities, on a competitive basis, to multiple State and local governments.

(13) The term “nondevelopmental item” means any of the following:

(A) Any commercial item.

(B) Any previously developed item of supply that is in use by a department or agency of the United States, a State or local government, or a foreign government with which the United States has a mutual defense cooperation agreement.

(C) Any item of supply described in subparagraph (A) or (B) that requires only minor modification or modification of the type customarily available in the commercial marketplace in order to meet the requirements of the procuring department or agency.

(D) Any item of supply currently being produced that does not meet the requirements of subparagraph (A), (B), or (C) solely because the item is not yet in use.

(14) The term “component” means any item supplied to the Federal Government as part of an end item or of another component.

(15) The term “commercial component” means any component that is a commercial item.

(Pub. L. 93-400, § 4, Aug. 30, 1974, 88 Stat. 797; Pub. L. 96-83, § 3, Oct. 10, 1979, 93 Stat. 649; Pub. L. 98-191, § 4, Dec. 1, 1983, 97 Stat. 1326; Pub. L. 98-369, div. B, title VII, § 2731, July 18, 1984, 98 Stat. 1195; Pub. L. 98-577, title I, § 102, Oct. 30, 1984, 98 Stat. 3067; Pub. L. 100-679, § 3(c), Nov. 17, 1988, 102 Stat. 4056; Pub. L. 101-510, div. A, title VIII, § 806(a)(1), Nov. 5, 1990, 104 Stat. 1592; Pub. L. 103-355, title IV, § 4001, title VIII, § 8001, Oct. 13, 1994, 108 Stat. 3338, 3384; Pub. L. 104-106, div. D, title XLII, § 4204, Feb. 10, 1996, 110 Stat. 655; Pub. L. 106-65, div. A, title VIII, § 805, Oct. 5, 1999, 113 Stat. 705.)

REFERENCES IN TEXT

This chapter, referred to in text, was in the original “this Act”, meaning Pub. L. 93-400, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 401 of this title and Tables.

CODIFICATION

Section 2731 of Pub. L. 98-369 directed in part that this section be redesignated as section 4 of Pub. L. 93-400 to correct an inconsistency in the language of the amendment by Pub. L. 98-191, which amended this section generally but referred to it as “Sec. 3”. Since this section was enacted as section 4 of Pub. L. 93-400 no change was required.

AMENDMENTS

1999—Par. (12)(E). Pub. L. 106-65 amended subpar. (E) generally. Prior to amendment, subpar. (E) read as follows: “Installation services, maintenance services, repair services, training services, and other services if such services are procured for support of an item referred to in subparagraph (A), (B), (C), or (D) and if the source of such services—

“(i) offers such services to the general public and the Federal Government contemporaneously and under similar terms and conditions; and

“(ii) offers to use the same work force for providing the Federal Government with such services as the source uses for providing such services to the general public.”

1996—Par. (12)(F). Pub. L. 104-106 inserted “or market” after “catalog”.

1994—Pub. L. 103-355, § 8001(b)(1), substituted “this chapter:” for “this chapter—” in introductory provisions.

Pars. (1) to (3). Pub. L. 103-355, § 8001(b)(2), (3), substituted “The term” for “the term” and period for semicolon at end.

Par. (4). Pub. L. 103-355, § 8001(b)(2), (4), substituted “The term” for “the term” and period for “; and” at end.

Pars. (5) to (9). Pub. L. 103-355, § 8001(b)(2), (3), substituted “The term” for “the term” and period for semicolon at end.

Par. (10). Pub. L. 103-355, § 8001(b)(2), (4), substituted “The term” for “the term” and period for “; and” at end.

Par. (11). Pub. L. 103-355, § 8001(b)(2), which directed substitution of “The term” for “the term” in par. (11), could not be executed because phrase “the term” did not appear subsequent to amendment by Pub. L. 103-355, § 4001. See below.

Pub. L. 103-355, § 4001, amended par. (11) generally. Prior to amendment, par. (11) read as follows: “the term ‘small purchase threshold’ means \$25,000, adjusted on October 1 of each year divisible by 5 to the amount equal to \$25,000 in constant fiscal year 1990 dollars (rounded to the nearest \$1,000).”

Pars. (12) to (15). Pub. L. 103-355, § 8001(a), added pars. (12) to (15).

1990—Par. (11). Pub. L. 101-510 added par. (11).

1988—Pars. (4) to (11). Pub. L. 100-679 redesignated pars. (5) to (11) as (4) to (10), respectively, and struck

out former par. (4) which defined “single system of Government-wide procurement regulations” for purposes of this chapter.

1984—Pars. (6) to (8). Pub. L. 98-369 added pars. (6) to (8).

Pars. (9) to (11). Pub. L. 98-577 added pars. (9) to (11).

1983—Pub. L. 98-191 amended section generally, restating definitions of “executive agency” and “procurement” and inserting definitions of “procurement system”, “single-system of Government-wide procurement regulations”, and “standards”.

1979—Pub. L. 96-83 designated existing provisions as subsec. (a) and added subsec. (b).

EFFECTIVE DATE OF 1996 AMENDMENT

For effective date and applicability of amendment by Pub. L. 104-106, see section 4401 of Pub. L. 104-106, set out as a note under section 251 of this title.

EFFECTIVE DATE OF 1994 AMENDMENT

For effective date and applicability of amendment by Pub. L. 103-355, see section 10001 of Pub. L. 103-355, set out as a note under section 251 of this title.

EFFECTIVE DATE OF 1979 AMENDMENT

Amendment by Pub. L. 96-83 effective Oct. 1, 1979, see section 12 of Pub. L. 96-83, set out as a note under section 401 of this title.

MODIFICATION OF FEDERAL ACQUISITION REGULATIONS

Section 2752 of Pub. L. 98-369 provided that: “Not later than March 31, 1985, the single Government-wide procurement regulation referred to in section 4(4)(A) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(4)(A)) shall be modified to conform to the requirements of this title [title VII of Pub. L. 98-369, §§2701-2753, July 18, 1984, 98 Stat. 1175-1203] and the amendments made by this title [see Short Title of 1984 Amendment note set out under section 251 of this title].”

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 57, 58, 252a, 254b, 259, 264a, 418a, 431, 701 of this title; title 6 sections 393, 421, 423; title 10 sections 2207, 2225, 2226, 2302, 2302a, 2306a, 2376, 2384, 2393, 2402, 2408, 2410, 2410b, 2410g, 2410i, 2482, 2636, 2662; title 15 sections 205c, 632, 637, 657a; title 16 sections 669h, 777h; title 20 section 1018a; title 22 section 2679c; title 31 section 3567; title 33 section 1368; title 40 sections 3707, 11101; title 42 sections 290aa-3, 5403; title 49 section 40118.

§ 404. Establishment of Office of Federal Procurement Policy; appointment of Administrator

(a) There is in the Office of Management and Budget an Office of Federal Procurement Policy (hereinafter referred to as the “Office”) to provide overall direction of Government-wide procurement policies, regulations, procedures, and forms for executive agencies and to promote economy, efficiency, and effectiveness in the procurement of property and services by the executive branch of the Federal Government.

(b) There shall be at the head of the Office an Administrator for Federal Procurement Policy (hereinafter referred to as the “Administrator”), who shall be appointed by the President, by and with the advice and consent of the Senate.

(Pub. L. 93-400, § 5, Aug. 30, 1974, 88 Stat. 797; Pub. L. 104-106, div. D, title XLIII, § 4305(a)(1), Feb. 10, 1996, 110 Stat. 665.)

AMENDMENTS

1996—Subsec. (a). Pub. L. 104-106 amended subsec. (a) generally. Prior to amendment, subsec. (a) read as fol-

lows: “There is established in the Office of Management and Budget an office to be known as the Office of Federal Procurement Policy (hereinafter referred to as the ‘Office’).”

EFFECTIVE DATE OF 1996 AMENDMENT

For effective date and applicability of amendment by Pub. L. 104-106, see section 4401 of Pub. L. 104-106, set out as a note under section 251 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 31 section 506.

§ 405. Authority and functions of the Administrator

(a) Development of procurement policy; leadership

The Administrator shall provide overall direction of procurement policy and leadership in the development of procurement systems of the executive agencies. To the extent that the Administrator considers appropriate, in carrying out the policies and functions set forth in this chapter, and with due regard for applicable laws and the program activities of the executive agencies, the Administrator may prescribe Government-wide procurement policies. These policies shall be implemented in a single Government-wide procurement regulation called the Federal Acquisition Regulation and shall be followed by executive agencies in the procurement of—

- (1) property other than real property in being;
- (2) services, including research and development; and
- (3) construction, alteration, repair, or maintenance of real property.

(b) Government-wide procurement regulations

In any instance in which the Administrator determines that the Department of Defense, the National Aeronautics and Space Administration, and the General Services Administration are unable to agree on or fail to issue Government-wide regulations, procedures and forms in a timely manner, including any such regulations, procedures, and forms as are necessary to implement prescribed policy initiated by the Administrator under subsection (a) of this section, the Administrator shall, with due regard for applicable laws and the program activities of the executive agencies and consistent with the policies and functions set forth in this chapter, prescribe Government-wide regulations, procedures and forms which shall be followed by executive agencies in the procurement of—

- (1) property other than real property in being;
- (2) services, including research and development; and
- (3) construction, alteration, repair, or maintenance of real property.

(c) Noninterference with executive agencies

The authority of the Administrator under this chapter shall not be construed to—

- (1) impair or interfere with the determination by executive agencies of their need for, or their use of, specific property, services, or construction, including particular specifications therefor; or
- (2) interfere with the determination by executive agencies of specific actions in the award or administration of procurement contracts.